United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF FOR REHEARING EN BANC

74-1793

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P/S

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RACHEL EVANS, STEVEN R. KIDD, FERNELL PATTERSON and WALTER B. BROOKS, JR., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

against

JAMES T. LYNN, Secretary, Department of Housing and Urban Development, et al.,

Defendants-Appellees,

and

TOWN OF NEW CASTLE

Defendant-Intervenor-Appellee.

REPLY BRIEF FOR APPELLANTS
ON REHEARING EN BANC

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ARGUMENT

I

FEDERAL NON-ENFORCEMENT OF THE AFFIRMATIVE ACTION REQUIREMENTS OF TITLES VIII AND VI DEPRIVES APPELLANTS OF A CRITICAL FEDERAL REMEDY FOR THEIR CONFINEMENT TO SEGREGATED HOUSING CONDITIONS.

The appellees in this lawsuit continue to argue that

the appellants have shown no injury in fact resulting from the Federal appellees' failure to enforce the affirmative action requirements of Title VIII of the Civil Rights Act of 1968 and the non-discrimination provisions of Title VI of the Civil Rights Act of 1964. The appellees' argument turns on the contention that there is no link between the appellants' injury of segregated housing conditions and the particular grants made by the Departments of Housing and Urban Development and Interior to New Castle. (See e.g. Town of New Castle Br. pp. 32-34). The appellees argue that the appellants' asserted injury flows only from their claim that they are forced to reside in areas of racial concentration in Westchester County and then state that, "The record is barren and there is simply no demonstrable causation between the undesirable conditions Judge Oakes perceives in the nation's ghettoized housing patterns (Slip Op. 3839), and the challenged grants to the Town." (New Castle Br. p. 34).

Appellees thus persist in refusing to recognize that we deal here with congressionally established policy to promote integrated patterns of residential living. Appellants do not maintain that New Castle would discriminate against minority citizens in the operation of or access to the sewer system or open space projects to be undertaken with these challenged grants. Rather, the appellants have maintained from the outset of this litigation that the Federal appellees are under a congressional mandate, in

making these grants, to act affirmatively to promote racial deconcentration in housing patterns. Whether that remedy is an effective one in confronting racial isolation and segregation is not a matter to be determined by the appellees. Nor is it for the judiciary to second-guess this congressional approach to resolving residential segregation. Congress has declared that it perceives a significant connection between Federal grant-making in the area of community development and possible deconcentration of housing opportunities for minority citizens.

The appellants all live in Westchester's racially impacted enclaves. They clearly come within the scope of the problem Congress sought to remedy in requiring affirmative action in community development grant-making. Their injury flows from the fact that they are confined to segregated communities and the Federal appellees failed to act affirmatively in administering the grant applications. As the appellants noted in their main brief, the Federal inaction deprived them of the Federal impetus for creation of fair housing opportunities and elimination of racial residential segregation in Westchester County.

New Castle also questions whether the Appellants indeed live in segregated sub-standard housing. (New Castle Br. p. 33). They point to the testimony of Appellant Rachel Evans, the only plaintiff that the Town sought to depose, that she now lives in housing that is basically satisfactory. At the time that

this action was filed in August, 1973, Mrs. Evans was in fact residing with her five children in an apartment unit that was slated for demolition. The apartment was located in an urban renewal section. By the time her deposition was taken, local public agencies had relocated her to a public housing complex in Peekskill. (See Evans Deposition pp. 9-12). The appellants in their first brief on this rehearing set forth the facts concerning the housing situation of the appellants (Appellants' Brief pp. 5-6), and, as Judge Oakes noted in his opinion, these facts concerning the residential segregation and housing inadequacies confronted by the appellants must be taken as true. (Slip Op. 3889). Repeatedly stressing Mrs. Evans' changed factual situation does not alter the allegations of the three other individual appellants or the claims of the class sought to be represented.

The appellants do not seek to violate concepts of appropriate judicial function. Nor did the majority of the panel that heard this case disregard accepted prerequisites for standing. The appellants merely seek to vindicate the rights established by Congress to alleviate segregated housing patterns. They are the aggrieved parties to which Congress addressed the remedial affirmative action requirements and certainly, the federal court is open to them to vindicate their statutory right.

II

THE ABSENCE OF INJUNCTIVE RELIEF WOULD NOT RENDER THIS CASE MOOT NOR CALL FOR THE ISSUANCE OF AN ADVISORY OPINION

New Castle argues in Point II of its brief that should the full Court agree with Judge Gurfein's concurrence, that the plaintiffs-appellants may not necessarily have standing to seek injunctive relief, then the appellants' claim in any event should be dismissed, either on grounds of mootness or that the appellants seek an advisory opinion.

Initially, the appellants would stress that they disagree with Judge Gurfein's view that they may not have authority to seek an injunction against dispersal of the grant monies in question in this litigation. It is the appellants' view that the question of injunctive relief is not an issue relating to standing, but a matter that falls within the sound discretion of the district court in the event of a finding of violation of the federal statute.

Nonetheless, the appellants would point out that should ultimate relief in this case not involve the issuance of an injunction, that the case is not moot and does not involve an advisory opinion. New Castle cites to the Supreme Court's recent decision in DeFunis v. Odegaard, 460 U.S. 312 (1974) to indicate that this case may indeed be moot as most of the monies sought to be enjoined have passed to New Castle. The Supreme Court in DeFunis, however, stressed

a finding of mootness was appropriate as injunctive relief no longer was needed as DeFunis had been admitted to the University of Washington Law School and was certain to conclude his final year of legal training at the school. The Court stated, "DeFunis did not cast his suit as a class action, and the only remedy he requested was an injunction commanding his admission to the Law School." 460 U.S. at 317. In the instant litigation, the appellants have brought this case as a class action and do seek declaratory relief pursuant to 28 U.S.C. 2201 and 2202. (See, 2a, 14a-15a.)

In two recent decisions, the United States Supreme Court has made clear that a district court must resolve a plaintiff's request for declaratory relief in cases where the request for injunctive relief is no longer appropriate. Thus, in Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 121 (1974), the Court stated, "The petitioners here have sought, from the very beginning, declaratory relief as well as an injunction. Clearly, the District Court had 'the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction.' " See, also, Steffel v. Thompson, 450 U.S. 452 (1974). Declaratory relief would be particularly appropriate with respect to federal agencies, as it is fair to assume, as the Supreme Court did in McCorkle and Steffel, that the judicial statement as to the state of the law would be respected by the defendants even

in the absence of injunctive relief.

Notwithstanding the exclusion of injunctive remedies, the parties would have sufficient interest, and the appellants sufficient injury, to justify the issuance of declarative relief. The appellants would continue to seek a determination as to the propriety of the federal government's response to the affirmative action requirements of the civil rights laws; the federal appellees would certainly persist in vigorously justifying the manner in which they conducted federal community development programs.

Respectfully submitted,

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No. 741793

CERTIFICATE OF SERVICE

This is to certify that two copies of the appellants' reply brief on rehearing en banc were served this 20th day of October, 1975 via first-class mail, postage prepaid, on counsel for defendants-appellees and intervenor appellee, as follows:

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October 20, 1975

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